

of granting leave to amend." *Id.* (quoting *Legate v. Livingston*, 822 F.3d 207, 211 (5th Cir. 2016))." Leave to amend a pleading should generally be granted in the absence of "(1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment.'" *Id.* (citing *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004)).

3. Defendant filed its counterclaim against Plaintiff weeks before the first scheduling order was put in place. *See* Dkt. 13 and Dkt. 16. Prior to doing so, Defendant had continued to attempt to negotiate settlement with Plaintiff. Once it became apparent that settlement negotiations were too far apart to reach agreement, Defendant filed this counterclaim. There is currently no deadline in the scheduling order for the parties to amend their pleadings.
4. This is Defendants' first request for leave to amend, Plaintiff has shown no prejudice she would suffer, and, as shown below, Defendant's amendment would not be futile because there is a clear basis for the court to exercise jurisdiction over these claims.

CONCLUSION

Defendants, Backsliders, LLC, dba South Austin Beer Garden, Ryan Thomas and David Pearce, pray the Court that upon trial hereof, Plaintiff recover nothing and that Defendants recover their damages in an amount to be proved at trial, as well as costs and attorneys' fees, and for such other and further relief as they may show themselves justly entitled.

Respectfully Submitted,

/s/ William T. Palmer

Thomas A. Nesbitt

tnesbitt@dnaustin.com

Texas Bar No. 24007738

Laura J. Goodson

lgoodson@dnaustin.com

Texas Bar No. 24045959

William T. Palmer

wpalmer@dnaustin.com

Texas Bar No. 24121765

DeShazo & Nesbitt L.L.P.

809 West Avenue

Austin, Texas 78701

512/617-5560

512/617-5563 (Fax)

ATTORNEYS FOR DEFENDANTS

**BACKSLIDERS, LLC, DBA SOUTH AUSTIN BEER
GARDEN, RYAN THOMAS, AND DAVID PEARCE**

CERTIFICATE OF CONFERENCE

I hereby certify that on the 19th day of September 2023, I conferred with counsel for Plaintiff and they stated that this motion is **opposed**.

/s/ William T. Palmer

William T. Palmer

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of September, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

Aaron Charles de la Garza
Aaron Charles de la Garza, PLLC
509 W. 18th Street
Austin, Texas 78701
aaron@adlglaw.com

Douglas B. Welmaker
Welmaker Law, PLLC
409 Fredonia, Suite 118
Longview, Texas 75601
doug@welmakerlaw.com

/s/ William T. Palmer
William T. Palmer